BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WILL COUNTY, ILLINOIS Petitioner, v. VILLAGE OF ROCKDALE, BOARD OF TRUSTEES OF VILLAGE OF ROCKDALE and ENVIRONMENTAL RECYCLING AND DISPOSAL SERVICES, INC., Respondents.	)	PCB No. 2016-054 (Pollution Control Facility Siting Appeal)

NOTICE OF FILING

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on March 14, 2016, Will County, Illinois filed with the Illinois Pollution Control Board, its **Reply Brief of Will County**, in this proceeding, a copy of which is attached and served upon you.

Dated: March 14, 2016

Respectfully submitted,

On behalf of WILL COUNTY, ILLINOIS

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CERTIFICATE OF SERVICE

I, Charles F. Helsten, an attorney, certify that I have served the attached **Reply Brief of Will County** on the named parties below by electronic service and by depositing the same in the U.S. mail at 100 Park Avenue, Rockford, Illinois 61101, at 5:00 p.m. on March 14, 2016.

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REPLY BRIEF OF WILL COUNTY

NOW COMES the Petitioner, Will County, Illinois by and through its attorneys HINSHAW & CULBERTSON, LLP, and hereby submits its Reply Brief in the above cited proceeding.

For the reasons set forth herein, Petitioner Will County respectfully requests that this Honorable Board overturn the decision by the Village Board to grant siting approval for the Moen Transfer Station.

A. The Village Board Lacked Jurisdiction Because ERDS' Notice Was Deficient.

In support of its argument that its notice was sufficient, ERDS relies on cases that are clearly factually and legally distinguishable from the present. It bears repeating that *Daubs Landfill* is distinguishable because, despite the erroneous legal description contained in the notice, the accompanying narrative description was sufficiently accurate to place interested parties on notice. *Daubs Landfill, Inc. v. IPCB*, 166 Ill. App. 3d 778, 782 (1988). In fact, ERDS acknowledges as much in its brief. ERDS Br. at 4.[1] Here, the notice propounded by ERDS was not accurate. As noted extensively in the County's Opening Brief, the notice did not indicate that

[1] ERDS failed to paginate its brief. Citations are therefore to the assumed appropriate pagination.

its stated "average throughput" of 200 tons per day was actually an "initial throughput," as became clear at the hearing. *Daubs* simply does not help ERDS.

ERDS next takes issue with the County's citation of *M.I.G. Investments, Inc. v. IEPA*, 122 Ill. 2d 392 (1988), and brushes off that case as irrelevant. However, *M.I.G. Investments* is particularly instructive here, because the Court was specifically concerned with the impacts caused by an increase in the amount of waste accepted by a pollution control facility due to an expansion of the facility. The Court noted that "[a]n increase in the amount of waste contained in a facility will surely have an impact on the criteria set out in section 39.2(a), which local governmental authorities are to consider." *Id.* at 401. Further, an increase in the amount of waste "might have a substantial impact on the surrounding community." *Id.* It is true that the *M.I.G. Investments* Court was determining whether a vertical expansion of a landfill constituted a "new" pollution control facility for purposes of Section 39.2, and in answering this question in the affirmative, the Court noted that "the nature of a landfill contemplates more than a mere surface utilization of the land." *Id*. at 400.

The Court's concern with the increased impacts from an increase in the amount of waste accepted at the facility is particularly instructive in the present case. The Court was insistent that such an increase must be fully considered by the local siting authority in order for the purposes of Section 39.2 to be realized. The purpose of the Act, according to the Court, is in part "to assure that adverse effects upon the environment are fully considered." *Id.* at 400. The *M.I.G. Investments* Court therefore required the applicant to undergo a full Section 39.2 siting proceeding, presumably also including appropriate pre-filing and pre-hearing notice. Although ERDS attempts to blithely dismiss its dramatic increase in the quantity of waste proposed to be received at the Moen Transfer Station between that stated in the notice and the apparent true

intended amount discussed at the hearing, that approach is totally inconsistent with *M.I.G. Investments*.

ERDS states, following a multi-page quote from *Tate v. IPCB*, that "it is indisputably obvious that an estimate of throughput volume or volume for a nonhazardous waste transfer station is not required in a pre-filing notice." ERDS Br. at 8. Ironically, *Tate* simply does not say that. *Tate* did not discuss throughput volume at all, so following ERDS's own logic, it has "fabricated arguments out of thin air." What Tate actually says is, "The notice is sufficient if it is in compliance with the statute and it places potentially interested persons on inquiry about the *details of the activity*." *Tate v. IPCB*, 188 Ill. App. 3d 994, 1019 (1989) (emphasis added). As such, Tate supports the County's position in this matter. As noted in the County's Opening Brief, an *accurate* statement of estimated size of the facility is necessary to place interested persons on notice about the details of the activity. Petitioners are not arguing that the notice should have been more "technically detailed," or "so technical that only an engineer would understand it"; the Petitioners are simply pointing out that the notice did not accurately describe the details of the proposed activity. Because the notice failed to comply with the statutory requirements, it was insufficient to confer jurisdiction on the Village Board.

ERDS claims that the notice was clear regarding its intent "to initially accept an average of 200 tons per day of waste in a facility that has the operational flexibility and design features to safely handle a much larger volume." ERDS Br. at 9. ERDS is incorrect. Nowhere did the notice indicate that the proposed "average" throughput volume was an initial estimate, and that the actual intent was to accept much larger volumes.

ERDS claims its intentions were "as clear in the testimony as in the siting application," which is true, because its intentions were unequivocally ambiguous in both instances. The cited

testimony in ERDS' brief precisely demonstrates how unclear its principals were on the anticipated throughput at the facility. ERDS Br. at 10-11.

Jay Ipema testified, in the space of a few pages of testimony, that the facility had an "anticipated volume of 200 tons to start," that "200 tons per day [is] the anticipated volume through the facility," that ERDS "also looked at a 600 ton per day scenario," and "that the site can easily manage the anticipated initial acceptance rate of 200 tons per day, it can readily manage an acceptance rate of 600 tons per day, and if you extend the hours, depending on the timing of the trucks entering it, it could manage greater than 600 tons per day under many scenarios." R. Tr. 52, 54, 56, 59. Mr. Ipema also testified that although the "intended volume or [sic] the waste accepted of 200, we would like a flexibility above that so that it would help us in operating the needs of the service area." R. Tr. 49. When asked what ERDS' intended cap was on volume to be accepted at the facility, Mr. Ipema stated: "I would say *at least* 600 tons because that's what we demonstrated we could handle." R. Tr. at 53. (Emphasis added). Further, if a volume of more than 200 tons per day were available, ERDS would accept that: "If it's out there, and there was a need for it, yes, we would [accept more than 200 tons]. But right now, we are proposing the 200 tons." R. Tr. 73.

This testimony establishes that the notice provided by ERDS did not accurately state the details of the proposed activity, as required by *Tate*. The notice was facially deficient, and the Village Board therefore lacked jurisdiction to hear the Application.

B. The Conditional Approval Was Contrary to Law.

ERDS argues that the "conditional approval" granted by the Village Board here is supported by *County of Lake v. IPCB*, 120 Ill. App. 3d 89 (1983). ERDS states, without actually citing any such case, that "*Lake County* has often been cited as authority for the proposition that establishing the siting criteria is a reasonable and necessary purpose of imposing conditions of

approval." ERDS Br. at 15. However, again ironically, Lake County does not stand for the proposition for which ERDS cites it. In fact, many of the conditions imposed by the county board in that case were stricken by the PCB, in part because the PCB found that a local siting authority did not have jurisdiction to impose "technical conditions" on an applicant. *Id.* at 97. The PCB's decision was affirmed in most respects by the Appellate Court; however, the Appellate Court held that the siting authority may impose conditions on an applicant "to accomplish the purposes of section 39.2 which means that local authorities can impose 'technical' conditions on siting approval.'" *Id.* at 99.

None of the cases cited by ERDS that purportedly support the imposition of conditions to bootstrap an application into compliance actually do so. Further, none of those cases impose conditions that allow for a later demonstration of compliance, as is the case here. *See* Will County Br. at 20-21.

Interestingly enough, ERDS has elected no to respond to the fact that the Village Board explicitly found that it had not met Criteria 2 or 5. The Village Board, by adopting the Hearing Officer's findings as to Criterion 2, found that ERDS had not met its burden to demonstrate that the facility design and storm water management plan would protect public health and safety. Hearing Officer Rpt. at 16 ("*The present state of the Application does not satisfy this concern*.") The Village Board nonetheless included a special condition that would allow ERDS to make a later demonstration of its compliance with Criterion 2. This is simply not the process provided for by Section 39.2, which requires that siting approval be granted only if the siting authority finds that the proposed facility *meets* the criteria, not that it will meet the criteria at some later date, upon submission of additional information.

Similarly, with respect to Criterion 5, the Village Board found that the "plan of operations has not been designed to minimize the danger from operational accidents arising out of on-site traffic movements." Ord. 1025, at p. 3 & Sec. 2; Hearing Officer Rpt. at 18. It then, in contradiction of the plain language of Section 39.2, imposed a condition that would allow ERDS to meet this criterion at a later date. As noted above and in Will County's Opening Brief, this process is inconsistent with the statute. The Village Board's decision to "conditionally approve" the Application, conditioned on a later demonstration of compliance, is therefore inconsistent with the statute, was against the manifest weight of the evidence, and should be overturned.

C. ERDS Did not Demonstrate Compliance with the Statutory Criteria

ERDS goes through a significant exercise of legal gymnastics to attempt to throw out well-established precedent on the showing required to satisfy this Criterion 1. ERDS states, with no legal support whatsoever, that "[b]ecause transfer stations have minimal impact compared to landfills, the need demonstration does not have to be as rigorous. The need determination for transfer stations is therefore mainly an economic determination." ERDS Br. at 33. ERDS argues that prior cases on Criterion 1 "are not really instructive," thus inviting the PCB to ignore this line of clear precedent. *Id.* at 30. We are unaware of any actual legal support for this novel approach. Although it is certainly understandable, and appealing, to invite a decision maker to ignore unfavorable precedent because it is, in that party's opinion, "not really instructive," that is not the way the system works.

ERDS also attempts to distinguish cases related to landfills from those related to transfer stations, and argues that transfer stations are subject to some different standard of "necessity" under Criterion 1 than landfills are. ERDS Br. at 25-26. That argument is also unsupported by the law of Illinois. Illinois courts apply the same standard for Criterion 1 to cases involving transfer stations as they do to landfill cases. For example, in *Waste Management of Illinois, Inc.*

v. IPCB, a case involving permitting of a transfer station, the court set forth the standard for necessity: "The petition must show that the landfill is reasonably required by the waste needs of the area, including consideration of its waste production and disposal capabilities." 243 Ill. App. 3d 65, 69 (1992). The comparison of waste production and disposal capabilities, which ERDS did not do in this case, is indisputably relevant to the determination of whether a transfer station meets criterion 1. There is simply no support for ERDS' argument that transfer stations are somehow subject to a different set of criteria, either in the plain language of the statute or in the cases interpreting the statute. Indeed, the case cited by ERDS to provide a standard of need in a transfer station case actually undermines its own proposition. That case, *Waste Management of Illinois, Inc. v. IPCB*, again stated that to show need, the applicant must show that the facility "is reasonably required by the waste needs of the area, *including consideration of its waste production and disposal capabilities*." 234 Ill. App. 3d 65, 69-70 (1992) (emphasis added). The court there found that the applicant's showing that the proposed transfer station would improve efficiency and eliminate some collection trucks was insufficient to show need, because the evidence did not show that "the waste transfer station was reasonably required by the waste needs of the area and *did not adequately address the waste production and disposal capabilities of the area*." *Id.*

ERDS attempts to include economic benefit to the County as a proper consideration under Criterion 1. However, previous cases have made it clear that, although economic benefit is not an improper consideration, it is not relevant to the siting criteria. In fact, the Illinois Appellate Court has stated that "there is no impropriety by the village board in considering the economic benefit [of the pollution control facility], *as long as the statutory criteria are also met*." *Fairview Area Citizens Taskforce v. IPCB*, 198 Ill. App. 3d 541, 547 (1990) (emphasis

added); *Stop the Mega-Dump v. DeKalb County*, 2012 IL App (2d) 110579, ¶ 62 ("Local siting authorities may consider such economic benefit *if they find that the statutory criteria have been met*." (emphasis added)).

Finally, ERDS argues for a "standard" of review whereby a siting authority could essentially never be reversed, because the standard is so broadly deferential and always shifting. ERDS Br. at 30. This proposal is unsurprisingly also unaccompanied by legal authority. The PCB has certainly overturned a local authority's decision as to need. *See Rochelle Waste Disposal, LLC v. City of Rochelle*, PCB 03-218, 2004 WL 916231, at 41-42 (Apr. 15, 2004). The manifest weight of the evidence standard is indeed deferential to a decision maker, but ERDS' proposed interpretation would render it meaningless.

As set forth in detail in Will County's Opening Brief, ERDS failed to show a necessity for the proposed facility consistent with Criterion 1 of Section 39.2 and its cases. The Village Board's decision to grant the Application must therefore be reversed.

With respect to Criteria 2 and 5, it is not a "minor technicality" that the Village Board explicitly found an "absence of proof on Criteria 2 and 5," see ERDS Br. at 14, but is a fatal defect to ERDS' application, which should have been denied. As noted above, the Village Board found that the Application had not met the criteria. It then imposed conditions that would allow ERDS to show consistency with the criteria at some later date. This approach is not consistent with Section 39.2 or the cases interpreting it. The Village Board's decision to grant siting authority to ERDS must therefore be reversed.

The fact that ERDS did not properly demonstrate compliance with the statutory criteria is underscored by the Village Board's own brief, which starkly challenges ERDS' contention that its application and supporting evidence support unconditional approval. The Village Board clearly

does not agree with ERDS, and believes the conditions imposed were necessary to bring the application into compliance with the statutory criteria. As such, the very siting authority that initially approved this proposal is, then, now questioning the veracity and true intentions of ERDS as well. For the reasons stated above and in Will County's Opening Brief, the showing by ERDS, and the resulting conditional approval by the Village Board, are contrary to Section 39.2.

D. Conclusion

For the reasons set forth herein, the Village Board's "conditional approval" of the Application should be overturned, and the Application should be denied.

Dated: March 14, 2016

Respectfully submitted,

On behalf of WILL COUNTY, ILLINOIS

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The undersigned certifies that on **March 14, 2016**, a copy of the foregoing **Reply Brief of Will County** was served upon the following:

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